Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269
	)	

REPLY COMMENTS OF FREE PRESS

Derek Turner, Research Director
Matthew F. Wood, Policy Director
Free Press
1025 Connecticut Avenue,
Suite 1110
Washington, DC 20036
202-265-1490

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I. Introduction

The comments in this proceeding reflect a near-universal consensus that the Commission's current spectrum allocation policies are not effectively promoting the public interest. The Twin Bells (AT&T and Verizon) want the Commission to create a safe harbor for spectrum license transfers, arguing that the current approach creates too much uncertainty.[1] Other wireless carriers observe that the Commission's policies impede competition by allowing the Twin Bells to control the lion's share of the best quality spectrum.[2] Public interest advocates point out that the existing spectrum screen is an inadequate tool for identifying potential competitive harms, and that the Commission's implementation of that screen has in fact pushed the market towards duopoly.[3]

We believe the record in this and prior proceedings offers ample support for the Commission to enact policies that treat spectrum as a critical input market, using antitrust analytical tools to ensure that concentration in this input market does not harm competition and the public interest. The three stage proposal described in our initial comments, combining cap and HHI[4] elements, offers the Commission a tool to identify potential market power-enhancing transfers while providing certainty for review of routine spectrum swaps and sales. We urge the Commission to adopt our proposal and base its spectrum allocation policies in well-established antitrust theory and practice.

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[1] AT&T Comments at 20; Verizon Wireless Comments at 11.

[2] T-Mobile USA Comments at 16; Sprint Nextel Comments at 4-6.

[3] Public Knowledge Comments at 2; Free Press Comments at 8-11.

[4] HHI is an acronym for the Herfindahl-Hirschman Index, a measure of market concentration based on the shares of the firms in the market. While the Department of Justice (and the Commission) traditionally use the HHI to measure the concentration of *product* markets, it also can be used to measure the concentration of *production* or *input* markets, such as spectrum. *See* Free Press Comments at 9-10.

II. Discussion

A. An HHI Screen is the Best Tool For Identifying Potential Market Power-Enhancing Spectrum Transfers

The current spectrum screen fails to promote the public interest, encouraging consolidation rather than efficiency and innovation, and ultimately pushing the market into duopoly. The biggest flaw of the spectrum screen is the blindness created by its over-simplicity. By drawing a soft line at 33 percent of the available spectrum, the screen routinely fails to identify transactions that would likely create or enhance market power.

We agree that the root of the problem is not necessarily *that* the Commission evaluates transactions on a case-by-case basis,[5] but *how* the Commission determines in each case whether a transfer is in the public interest.[6] However, providing more "certainty" with a policy that pre-blesses potentially harmful transactions – for example, by creating an inviolable safe harbor that allows aggregation of 33 percent (or more) of the available spectrum in a particular market – would only exacerbate the very problems that necessitated this proceeding in the first place.[7] If the Commission were to treat the 33 percent screen as an unchallengeable safe harbor, it would open the door to mergers that clearly raise enough competitive concerns to warrant scrutiny.[8] Furthermore, creating a safe harbor at a level higher than 33 percent, as AT&T requests, would result in the pre-

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[5] Though we strongly believe there is a need for a public interest safe harbor that caps the amount of spectrum that any single licensee can hold at 35 percent.

[6] AT&T Comments at 12 ("Today's marketplace uncertainty is not a product of the safe harbor/case-by-case approach itself but of uncertainty as to how that approach will be applied.").

[7] *See, e.g.*, AT&T Comments at 48-54; Verizon Wireless Comments at 5.

[8] For example, the hypothetical acquisition of MetroPCS by AT&T or Verizon would clearly raise competitive concerns, yet in some local markets the transfer of MetroPCS's 10-20 MHz of spectrum to AT&T or Verizon would not cause the Baby Bell to exceed a 33 percent screen.

blessing of mergers that the Commission and the Department of Justice have already rejected.[9] This self-serving suggestion is understandable enough considering its source, and considering AT&T's negative reaction when these agencies stopped the company's competition-killing bid for T-Mobile. But it is clear that the approach favored by AT&T and Verizon is not the right solution to the current problems with the Commission's spectrum allocation policies.

The Commission should drop the overly simplistic 33 percent spectrum screen and replace it with an HHI-based screen that will provide carriers with the safe harbor they desire for truly routine transactions while protecting the public from harmful market power-enhancing transfers. As discussed in our initial comments, the use of an HHI-based screen will give the Commission a more precise tool for identifying potentially problematic transactions that otherwise would not run afoul of the existing screen. An HHI-based screen also incentivizes the *market* to make the most efficient use of spectrum by favoring transactions that bring new or fallow spectrum to the market over mergers between existing competitors.

B. An Overall Spectrum Cap and a Sub-1 GHz Spectrum Cap Will Provide Market Certainty, Encourage More Efficient Use of the Public Airwaves and Prevent the Wireless Market From Descending Further Into Duopoly

In their comments, AT&T and Verizon both express a strong desire for a screen that acts a safe harbor for transactions, while also forcefully arguing against the use of spectrum caps. We appreciate this desire for certainty and agree that the Commission

[9] AT&T's proposed acquisition of T-Mobile USA would have resulted in AT&T controlling between 35 and 45 percent of the available spectrum in many major U.S. local markets. For example, in 9 of the top 10 CMAs AT&T would have exceeded the 33 percent threshold (39 percent in Los Angeles; 35 percent in Chicago and Philadelphia; 36 percent in Detroit; 37 percent in Boston; 42 percent in San Francisco and Dallas-Ft. Worth, TX; 33 percent in Washington D.C.; and 40 percent in Houston, TX).

should establish a process that leads to the rapid approval of routine and minor spectrum transfers. However, simply weakening the existing review process by turning the 33 percent screen into an inviolable safe harbor would harm the public interest.

The rebuttable presumption framework we proposed in our comments offers firms the safe harbor they desire without preventing the Commission from closely scrutinizing transactions that are likely to enhance market power and frustrate competition. As much as carriers want certainty, however, consumers also need a safe harbor from excessive spectrum aggregation and the harms that flow from it. That is why it is critical for the Commission to set a bright line limit on the amount of available spectrum that any single firm can control, which we strongly believe should be set at 35 percent. Furthermore, because a balanced spectrum portfolio is critical for every carrier to compete effectively at the national level, the Commission also must establish a sub-1 GHz spectrum cap.[10]

We recognize that most carriers are deeply opposed to most spectrum caps; but caps on overall spectrum holdings and sub-1 GHz spectrum holdings, set at a level slightly higher than the existing 33 percent screen, would preserve a floor of competition. The benefits of the Commission's rejection of the AT&T-T-Mobile merger are undeniable, and illustrate how policies that limit concentration and favor competition over consolidation ultimately lead to more efficient use of the public airwaves. Once

[10] T-Mobile argues for a 35 percent cap on newly auctioned spectrum, but does not support an overall spectrum cap. *See* T-Mobile Comments at 7-8. Sprint supports a sub-1 GHz spectrum cap of 33 percent, but not an overall cap. *See* Sprint Comments at 4. It is understandable that these competitive carriers would not expressly endorse an overall cap (at any level) because such a policy would foreclose the possibility of future mergers between their companies and other major carriers. However, while this is an understandable position from a private interest perspective, the Commission's job is to enact spectrum allocation policies that promote the public interest. A firm cap, set at 35 percent, is such a policy.

AT&T understood that it would not be able to increase network capacity by purchasing T-Mobile and gaining control of 40 or more percent of the available spectrum in many major markets, the carrier turned to other alternatives such as increased Wi-Fi offloading, small cell technology, spectrum re-farming, and the use of existing fallow spectrum such as WCS. If the Commission would have had a spectrum cap in place at the time at a level of 35 or even 40 percent, AT&T would have known in advance that the acquisition of T-Mobile could not come close to passing regulatory scrutiny, and it would not have wasted its or the government's time on the harmful transaction.

We strongly believe the HHI-based screen we propose would identify potentially problematic transactions that warrant close review, but believe that a cap (particularly a sub-1 GHz cap) is another critical component of a sensible spectrum allocation policy – one that provides carriers and consumers certainty.[11]

III. Conclusion

The comments in this proceeding reflect a strong desire on the part of wireless carriers for greater certainty about the boundaries of acceptable spectrum aggregation. But consumers too need certainty about the future of wireless competition. It is clear that the existing spectrum screen is not working for either carriers or consumers. The market is descending into duopoly and a carrier's political prowess often matters as much in transaction reviews as the underlying facts themselves. The Commission can protect consumers, provide certainty and dilute the impacts of politics by jettisoning the existing, overly simplistic spectrum screen, and then replacing it with a spectrum-share HHI

[11] We note that in the case of spectrum auctions, a particular market's spectrum-share HHI would decrease, or at worst increase slightly even if the Twin Bells acquired all of the auctioned spectrum. Thus the Commission could simplify the analysis in auctions by setting aside the spectrum-share HHI screen and relying solely on a spectrum cap.

screen buttressed by generous spectrum caps on overall and sub-1 GHz spectrum. We urge the Commission to give careful consideration to the Free Press proposal and to base its spectrum allocation policies in well-tested antitrust practices.

Respectfully submitted,

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Derek Turner

______/s/_____________
Matthew F. Wood

Free Press
1025 Connecticut Avenue,
Suite 1110
Washington, DC 20036
202-265-1490